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THE "MUTUALITY" RULE IN NEW YORK.

The term "mutuality" when applied to contracts is sometimes used in a loose and inaccurate sense to indicate the mutuality of obligation which results from the exchange of mutual promises, each of which is consideration for the other in the creation of a bilateral contract.[1] When used in this sense mutuality is essential to the creation of the contract for without it there is no consideration for the promisor's promise. If there is want of mutuality there is no legal obligation on either side, although obviously in the case of a unilateral contract where *A* does an act or gives something in exchange for *B's* promise, there is a contract, but no mutuality, since *A* is not bound by the contract, although he is entitled to enforce it. More accurately used, the term "mutuality" refers to the rule very generally applied in equity that specific performance of a contract will not be decreed unless the defendant has received or the court is in a position to give to the defendant all that he is entitled to receive under the contract in exchange for the performance of it on his part.

It is obvious that this rule has nothing to do with the rule first referred to, which relates to the formation of a contract, since it becomes applicable only when a contract has actually become legally obligatory and has become the subject of inquiry by a court called upon to exercise its equity powers of specific performance. In other words, there may be cases where a contract has not come into existence because the plaintiff has failed to give a promise

[1]Willets *v.* The Sun Mut. Ins. Co. (1871) 45 N. Y. 451; Marie *v.* Garrison (1880) 83 N. Y. 14; Mahaney *v.* Carr (1903) 175 N. Y. 454, 67 N. E. 903; National Citizens' Bank *v.* Toplitz (1904) 178 N. Y. 464, 71 N. E. 1; Levin *v.* Dietz (1909) 194 N. Y. 376, 87 N. E. 454; Riker *v.* Comfort (1910) 140 App. Div. 117, 124 N. Y. Supp. 1106; Goodyear *v.* Koehler Sporting Goods Co. (1913) 159 App. Div. 116, 143 N. Y. Supp 1046; Redican *v.* Interchangeable etc. Sign Co. Inc. (1914) 162 App. Div. 803, 146 N. Y. Supp. 596; Lynch *v.* Murphy (1913) 81 Misc. 180, 142 N. Y. Supp. 373.

which was necessary in order to accept the defendant's offer in accordance with its terms. On the other hand, there may be a legally binding contract which a court of equity will refuse to enforce because it cannot insure the defendant's receiving that in exchange for which his promise was given. Professor Pomeroy,[2] in stating the essential elements of the right to specific performance, says that the contract to be specifically performed "must be in general mutual in its obligation and its remedy". He uses similar language in his book on Specific Performance of Contracts, and in this he follows substantially the statement of the doctrine of mutuality of remedy as it appears in Lord Justice Fry's treatise on Specific Performance.[3] This statement of Pomeroy's has often been made the basis of judicial decision, and has been repeatedly cited with approval by the New York courts,[4] but like many other attempts at the formulation of a rule of law, without giving any clue to the reason of the rule, this statement has been most mischievous in its influence upon judicial decisions.

Assuming a valid legal contract, free from fraud or duress or other unfairness in its formation, for the breach of which legal damages would be inadequate, why should equity set any limits upon its authority to compel specific performance? Obviously courts of equity, which are courts of conscience, do not recognize the moral or legal right of one who is a party to such a contract not to perform it. If, therefore, equity withholds its hand from compelling performance of the contract because of the mutuality rule, it does so not because it recognizes the right on the part of either party not to perform his contract obligation, but because of expediency or because it would do some injustice to the defendant by compelling him to perform his contract.

If a plaintiff sues at law for breach of contract, he seeks damages only, and his damage in general is measured by finding the difference in money value between the performance which he is entitled to receive from the defendant under his contract and its

[2]Pomeroy, Equity Jurisprudence (Stud. Ed.) § 1405. It is only fair to state that this statement has been taken more literally by the courts than the author probably intended. See Pomeroy (2nd Ed.), Specific Performance § 165.

[3]Fry, Specific Performance (3rd Am. ed.) § 440.

[4]Palmer *v.* Gould (1895) 144 N. Y. 671, 39 N. E. 378; Stokes *v.* Stokes (1896) 148 N. Y. 708, 43 N. E. 211; Mahaney *v.* Carr (1903) 175 N. Y. 454, 67 N. E. 903; Ide *v.* Brown (1904) 178 N. Y. 26, 39, 70 N. E. 101; Wadick *v.* Mace (1908) 191 N. Y. 1, 5, 83 N. E. 571; Levin *v.* Dietz (1909) 194 N. Y. 376, 87 N. E. 454; Riker *v.* Comfort (1910) 140 App. Div. 117, 124 N. Y. Supp. 1106.

reasonable cost if he procures the performance or a similar performance from another. But if the plaintiff is entitled to resort to equity for specific performance, the court will give him, so far as possible, the complete performance of the defendant's obligation. It is apparent that a court of equity would do an injustice to a defendant if it compelled him to perform his contract, and if at the same time for any reason it could not or would not compel the plaintiff to perform the contract on his part, and thus left the defendant who had been compelled to perform his contract, to his remedy at law for damages on the contract. If, on the other hand, the defendant has received that which he is entitled to receive under his contract either because the plaintiff has performed his promise, or for the reason that the consideration given by the plaintiff for the defendant's promise is doing or giving something instead of promising to do or give something, or whenever the court can compel the plaintiff to do that which he has contracted to do, then in such case there is no want of mutuality of remedy as that rule has been developed by courts of equity.

Inability of the court to compel the plaintiff to perform may arise either because the plaintiff is not unconditionally bound by his contract, as it is in the case of infants' contracts, because of impossibility of performance by the plaintiff, as in the case of a vendor who is unable to make good title, or because of the equity rule that the court will not, on the grounds of expediency, compel the performance of contracts involving continuous acts or personal service. For example, equity would not compel an artist to paint a picture in return for a conveyance of real estate by the defendant. The practical inability of a court to compel the artist to perform his contract will result in the court's refusing to take jurisdiction, thus leaving the parties to the contract to their remedy at law. To compel the vendor to convey when the court cannot compel the vendee to perform would work a greater injustice than for equity to withhold the remedy altogether.

There is want of mutuality of remedy, then, when and only when the court is unable, for any reason, to insure the defendant's receiving that which he is entitled to receive in exchange for the performance of his own promise. Or, stated in somewhat different form, a court of equity will not compel a defendant to perform his contract if it must leave him to pursue his remedy on the contract for legal damages.[5]

[5]See 3 Columbia Law Rev. 1.

It is established by abundant authority in nearly every jurisdiction that the rule that in equity the remedies on a contract must be mutual has nothing to do with mutuality of obligation. If there is a legal contract, and equity, by its decree, can leave it fully performed on both sides so that each party has received that which he was entitled to receive under his contract, then there is no want of mutuality, and the court should exercise its jurisdiction to compel the performance of the obligation created by the contract.

The rule in equity that the remedies upon contract must be mutual thus explained, is not in any sense an artificial or technical rule, but finds its justification in the plainest dictates of morality and good sense. This has been recognized by many decisions of the New York courts. Thus, following the current of authority in other jurisdictions, they have held that when one party to a contract for the sale of land has not signed the memorandum of sale, the other may, nevertheless, procure a specific performance of the contract.[6] By serving his complaint and asking the court to compel the defendant to perform his contract, the plaintiff submits to the jurisdiction of the court, and may be compelled to perform the contract on his part. There is thus no want of mutuality of remedy, and the court will compel specific performance of the whole contract. While there was a lack of mutual obligations in the sense that the plaintiff could have successfully resisted specific performance, had the action been brought against him by the defendant suing as a plaintiff, by pleading the Statute of Frauds, nevertheless, since the court can give to the defendant all that he is entitled to receive under the contract, want of mutuality is not available to him as a defence. In the same way a principal whose agent has exceeded his authority in entering into a contract may entitle himself to relief in equity by ratifying his agent's act.[7] Or a plaintiff who stipulated that upon the happening of a certain contingency he should not be bound may nevertheless waive the stipulation and by bringing his action entitle himself to specific performance.[8]

It would follow that an infant who, as a defendant, could plead his infancy may, on coming of age, file his bill for specific perform-

[6]Mason *v.* Decker (1878) 72 N. Y. 595; Mutual Life Ins. Co. *v.* Stephens (1915) 214 N. Y. 488, 108 N. E. 856; Codding *v.* Wamsley (1874) 1 Hun 585, aff'd. (1875) 60 N. Y. 644; Pettibone *v.* Moore (1894) 75 Hun 461, 27 N. Y. Supp. 455; Clason *v.* Bailey (N. Y. 1817) 14 Johns. *484, *489; M'Crea *v.* Purmort (N. Y. 1836) 16 Wend. 460.

[7]Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 8, 109 N. E. 80, 82.

[8]Catholic etc. Society *v.* Oussani, *supra.*

ance. There is, then, no want of mutuality, since by bringing action the contract has been ratified, and since the court, by its decree may give to the defendant all that he is entitled to receive under his contract; and the defendant cannot complain at being compelled to perform his contract. While no case has been found in New York applying this doctrine, it has the support of authority in other jurisdictions.[9] In the same way, the contract vendor whose title is unmarketable, cannot be compelled to perform. But if before the date set for the performance of his contract or indeed before he is barred by laches or the statute of limitations, he perfects his title, he may compel the vendee to perform specifically his contract.[10] Indeed, where there is a deficiency in the quantity of the subject matter of the contract, or even a defect in title, which is not substantial, the court may, in its discretion, compel specific performance, allowing to the defendant a suitable deduction from the purchase price.[11]

Upon like principle, where the plaintiff's performance of his contract involves personal service, or the doing of continuous acts, performance of which a court of equity could not or would not compel, it may, nevertheless, compel the defendant to perform when the contract has been fully performed by the plaintiff. That the plaintiff is no longer under a contract obligation to the defendant is and should be immaterial, since the defendant, having received all that he is entitled to receive under the contract, has no moral or legal ground for resisting performance on his part.[12]

In each of these classes of cases, it should be observed that the requirement of the mutuality rule, as stated by Pomeroy, if taken literally, namely that there must be mutuality of obligation and remedy, was not satisfied.

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[9]Clayton *v.* Ashdown, 9 Vin. Abr. 393, G. 4 *Plac.* 1.

[10]Bruce *v.* Tilson (1862) 25 N. Y. 194; Jenkins *v.* Fahey (1878) 73 N. Y. 355; see Blakslee Mfg. Co. *v.* Blakslee's Sons Iron Wks. (1891) 129 N. Y. 155, 29 N. E. 2; Reformed etc. Church *v.* Mott (N. Y. 1838) 7 Paige Ch. 77. The opposite view followed in a few jurisdictions see Norris *v.* Fox (C. C., N. D. Mo. 1891) 45 Fed. 406; Luse *v.* Deitz (1877) 46 Iowa 205, has been justly criticized. See Dresel *v.* Jordan (1870) 104 Mass. 407, and must be regarded as exceptional. See 1 Ames Cases on Equity 326 n. 5; Butts *v.* Genung (N. Y. 1835) 5 Paige Ch. 255.

[11]See Palmer *v.* Gould (1895) 144 N. Y. 671, 39 N. E. 378; Smyth *v.* Sturges (1888) 108 N. Y. 495, 15 N. E. 544; Merges *v.* Ringler (1898) 34 App. Div. 415, 422, 54 N. Y. Supp. 280; King *v.* Bardeau (1822) 6 Johns. Ch. 38, 44; Winne *v.* Reynolds (1837) 6 Paige Ch. 407; Keating *v.* Gunther (1890) 10 N. Y. Supp. 734.

[12]Howe *v.* Watson (1901) 179 Mass. 30, 60 N. E. 415; 1 Ames Cases on Equity 430, n. 3.

The position of the parties to a bilateral contract where the plaintiff has performed on his part, the defendant's promise remaining executory, is precisely the same as in the case of a unilateral contract where the plaintiff has done something or given something in exchange for the defendant's promise. That the plaintiff's act is not preceded by an obligation on his part to do it should not affect the moral or legal obligation of the defendant to do that for which he has been compensated by the plaintiff; and so are the authorities, in those jurisdictions where the question has arisen.[13]

It has remained for the courts of New York, however, following literally the passage quoted from Fry and Pomeroy, to give countenance to a supposed rule that there can be no specific performance of a unilateral contract because, notwithstanding the fact that the plaintiff has given or tendered to the defendant exactly that which the defendant is entitled to receive in return for his promise, there is want of mutuality of obligation which should prevent equity's exercising any jurisdiction over the contract.

This supposed rule seems to have originated with the case of *Stokes* v. *Stokes*.[14] In this case the defendant sought to enforce by way of counter-claim an agreement on the plaintiff's part to deposit with defendant certain bonds which it was claimed the plaintiff had agreed to give the defendant as security for an indebtedness of the plaintiff to the defendant. The agreement recited that defendant was to purchase from one *R* 1963 shares of the stock of a corporation in which the plaintiff and defendant were already interested as stockholders "or a portion thereof with the

[13] 1 Ames Cases on Equity 430 n. 3, 431 n. 2. In fact in New York, courts of equity have not hesitated to enforce a voluntary promise to convey land where in reliance upon it the promisee occupied the land and made improvements. Freeman *v.* Freeman (1870) 43 N. Y. 34; Young *v.* Overbaugh (1895) 145 N. Y. 158, 39 N. E. 712; Messiah Home *v.* Rogers (1914) 212 N. Y. 315, 106 N. E. 59. In such a case the promisee is obviously under no obligation, and indeed, there is no contract, the jurisdiction arising from the conduct of the defendant in inducing the plaintiff to occupy the premises and improve them in reliance upon the defendant's promise and to prevent the latter's unjust enrichment.

[14] (1896) 148 N. Y. 708, 43 N. E. 211; but see the language of the opinion in Palmer *v.* Gould (1895) 144 N. Y. 671, 677, 39 N. E. 378. As was pointed out however in Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 8, 109 N. E. 80, 82, the opinion of Gray J. in that case was not adopted by the court and all that was actually decided was that the case was not a proper one for partial performance with compensation. Chancellor Kent seems to have thought that the mutuality rule in equity required mutuality of obligation, Benedict *v.* Lynch (1815) 1 Johns. Ch. 370, 373, but in Clason *v.* Bailey (N. Y. 1817) 14 Johns. *484, *487, he recognized that the rule was the other way saying at *490: "It appears from the review of the cases that the point is too well settled to be now questioned."

intent that they may together be the owners of the whole of the stock of said corporation"; and the agreement stipulated "that the defendant agrees to sell and transfer one half of or the whole of said portion of said 1963 shares of common stock as he may purchase from said" *R* upon terms which were set out at length by the contract. After the execution of the contract the defendant purchased 500 shares of the stock of *R* but was unable to purchase any more. The plaintiff failed to deposit the bonds with defendant as security and the stock purchased by the defendant had not been transferred to plaintiff, but so far as appears, the contract had in all other respects been performed by the parties. Obviously the sole question before the court was one of interpretation. Had the defendant, by purchasing 500 shares of stock from *R* and by obligating himself to transfer one half of it to the plaintiff done such acts as rendered obligatory the plaintiff's obligation to deposit the bonds under the agreement? This depended upon the true interpretation of the contract. If the defendant had procured a sufficient amount of the stock to render the plaintiff's promise operative, then the defendant was entitled to have the plaintiff perform his contract, and this irrespective of whether the defendant was in the first instance bound to purchase the stock or not. The majority of the court did indeed rest its decision in part upon the ground that the true meaning of the contract was that the defendant was required to purchase a more substantial proportion of the outstanding stock than 500 shares, in order to entitle him to the plaintiff's performance of his contract. But not content with this basis of decision, the court rested its decision upon the rule as stated by Pomeroy. After commenting on the fact that the plaintiff was not bound to purchase the stock of *R*, the court said,[15] "A contract must possess certain elements in order that a court of equity may exercise jurisdiction to compel its performance. It must be upon valuable consideration; it must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be in general mutual in its obligations and its remedy." In short, as applied to the facts of this case, the plaintiff who had done precisely the thing which entitled him to the defendant's performance, was held, nevertheless, not entitled to the aid of a court of equity, because the plaintiff was not originally bound to give that which he had actually given in exchange for the defendant's promise.

[15] 148 N. Y. 708, 716, 43 N. E. 211.

This doctrine, as announced in *Stokes* v. *Stokes,* has received the sanction of judicial approval in several later cases, but it did not receive its logical application until the decisions in *Wadick* v. *Mace*[16] and *Levin* v. *Dietz.*[17]

In *Wadick* v. *Mace* the defendant, the vendor of real estate, had stipulated in the contract of sale that in the event of default by the vendee the vendor's right on the contract should be limited to retaining the one thousand dollars of deposit money paid by the vendee to the vendor. The court, quoting the statement of the mutuality rule from Pomeroy, that a contract must be "mutual in its obligation and in its remedy," in order to warrant a decree for specific performance, held that since the vendor had waived his right of specific performance against the vendee there was want of "mutuality" in the contract and that specific performance should not be granted. In reaching this result the court proceeded on the assumption that there could be no specific performance in favor of the plaintiff, unless the defendant, suing as a plaintiff, could have compelled specific performance by the other party to the contract, who in this case was the plaintiff-vendee.

The court also suggested that the provision waiving specific performance in favor of the vendor was inserted with knowledge of the rule which requires mutuality of remedy as the basis of a suit to enforce specifically a contract and that therefore the vendor, in relinquishing the right to an equitable remedy against the vendee "assumed that her action in so doing necessarily involved its relinquishment on the part of the vendee."

As we have seen, neither the mutuality rule nor the reason for the rule denies to every plaintiff the right to specific performance merely because he could not be subjected to such an action by the other party to the contract. Here the defendant was legally bound by his contract and the plaintiff legally entitled to have the defendant perform it. Because the defendant had expressly waived the right to have the plaintiff specifically perform, it cannot be inferred that the plaintiff waived or intended to waive such a right on his part, or if inferred the inference must rest on the stipulation of the parties and not the rule that in equity the remedies must be mutual. To assume that the parties to the contract had such familiarity with the doctrine of mutuality that they must have intended by the waiver of the right to specific performance

[16](1908) 191 N. Y. 1, 83 N. E. 571.

[17](1909) 194 N. Y. 376, 87 N. E. 454.

on the part of one of the parties to waive it for both is to assume a knowledge on their part of an application of the rule which had not previously been made in the State of New York, and that they had a better knowledge of the mutuality rule than the Appellate Division, whose judgment was reversed by the Court of Appeals.

Legally and morally, therefore, the plaintiff was entitled to the benefit of his contract, and there is no principle either of equity or sound morals, which should deprive him of it, provided equity could compel the plaintiff to give to the defendant all that he was entitled to receive under his contract. And this the court was in a position to do. By filing his bill and asking the performance of the contract and asserting his willingness to carry it out, he waived the stipulation reserved in his favor and subjected himself to the jurisdiction of the court, and this was sufficient to enable the court to enter its judgment against the plaintiff as well as the defendant.[18] In any case, where the defendant is unconditionally bound, tender of performance by the plaintiff is not necessary to enable plaintiff to maintain his action for specific performance. The service of his complaint alleging his willingness to perform is sufficient.[19]

A consequence of this decision if its reasoning be followed is that parties to a contract over which equity would otherwise have jurisdiction may not, however obvious their intention and however explicit their language, reserve the right to specific performance to one party and waive it for the other. A rule which thus does violence to the intention of the parties to a contract without some controlling reason resting in positive law or morals, should not commend itself to "a court of conscience".

Had the stipulation waiving the right to specific performance been reserved for the benefit of the vendor a very different question would have arisen. In such a case the vendee would have no right to specific performance against the vendor, and the vendor could not therefore for any purpose be regarded as the trustee of the legal title for the vendee or as a quasi-mortgagee of the vendee. He therefore comes into court, not as the holder of the legal title, subject to equitable obligations, and therefore

[18]Catholic etc. Society *v.* Oussani (1915) 215 N. Y. 1, 109 N. E. 80.

[19]Jenkins *v.* Fahey (1878) 73 N. Y. 355; Baldwin *v.* Salter (N. Y. 1840) 8 Paige Ch. 473; Stevenson *v.* Maxwell (1849) 2 N. Y. 408; Bruce *v.* Tilson (1862) 25 N. Y. 194; Freeson *v.* Bissell (1875) 63 N. Y. 168; see Thomson *v.* Smith (1875) 63 N. Y. 301, 304.

entitled to the aid of the court of equity to adjust his rights and obligations with respect to the vendee,[20] but as a plaintiff seeking the payment of money only. A court having no jurisdiction over the contract obviously does not acquire it merely because the plaintiff seeks its aid, and here the element essential to jurisdiction, namely a legal title held subject to an equitable obligation is wanting. When the situation is reversed, the plaintiff-vendee is entitled to call for a conveyance. Legal damages are inadequate and the court therefore has jurisdiction and ought to exercise it, unless a proper application of the mutuality rule prevents.

In *Levin* v. *Dietz*[21] defendant offered in writing to convey to the plaintiff a sufficiently described plot of real estate upon payment to defendant of a specified sum of money. At the time and place named in the offer the plaintiff tendered to the defendant the amount called for by the offer. His tender was refused, whereupon he brought his action for specific performance of the contract. The court denied any relief to the plaintiff because of want of mutuality in the contract, using the term mutuality in both of the senses to which reference has been made.

The court raised the question whether there was any contract binding the plaintiff to buy the land in question, and if there was a contract, whether a court of equity at the suit of the plaintiff not so bound by it would enforce performance by his adversary, the court saying, page 378, "We think that both these questions must be answered in the negative and that it must be held that the respondents were not under any obligation to buy appellant's land, and that therefore there was lack of consideration for the latter's contract and lack of that mutuality of obligation, which are both essential to the successful prosecution of the action."

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[20] This, it is believed, is the real basis of the right of a vendor to have specific performance, a right sometimes expressed by the formula that the "remedies must be mutual and when a bill will lie for the purchaser it will also lie for the vendor". Addeley *v.* Dixon (1823) 1 Sim. & S. 607; Crary *v.* Smith (1848) 2 N. Y. 60; see Rindge *v.* Baker (1874) 57 N. Y. 209, 219; Baumann *v.* Pinckney (1890) 118 N. Y. 604, 612, 23 N. E. 916.

Where the plaintiff has a right to specific performance because and only because the defendant has a right of specific performance against the plaintiff, the "mutuality" is to be distinguished from mutuality of remedy as it has been defined in this article. In the previous case "mutuality" is a ground for the exercise of jurisdiction, in the latter, it is a reason for refusing to exercise it. Obviously one could not resort to equity to collect the purchase price of a unique chattel after delivery of the chattel to the vendee or of land after conveyance. See Jones *v.* Newhall (1874) 115 Mass. 244; 3 Columbia Law Rev. 1.

[21] (1909) 194 N. Y. 376, 87 N. E. 454.

If the defendant's promise to convey the land was without consideration there was obviously no contract and no question of the mutuality of equitable remedy was involved. As has already been pointed out, where the offer calls for a promise, both parties must be bound by the contract if it comes into existence. If there is want of mutuality of obligation there is no contract. But it does not follow that there can be no contract without mutuality of obligation. Where the offer calls for the doing of an act exclusively and the offeree performs the act, the contract comes into existence, although the offeree never became obligated to perform it. It is obvious, therefore, that in *Levin* v. *Dietz* the mutuality of obligation necessary under certain circumstances to the formation of a contract, was not involved, since the offer at most contemplated the formation of a unilateral contract by the doing of an act on the plaintiff's behalf, and not by his promising to do it. Whether the plaintiff did or did not pay the money to the defendant, he was not under any circumstances to incur any obligation to pay it.

That one may acquire rights under a contract without becoming himself bound by it is too well settled in this state to require any extended comment.[22] If, for example, the defendant had received the money, it cannot be believed that any court would have denied to the plaintiff relief, although obviously there would have been no mutuality of obligation. The first question involved, then, in *Levin* v. *Dietz* was whether the plaintiff's act was such an act as constituted an acceptance of the defendant's offer and was therefore sufficient to create a contract.

Unquestionably, if the plaintiff had paid and the defendant had accepted the money, a contract would have arisen for breach of which the defendant would have been liable in damages. But wherever an act is necessary to establish a right at law in favor of the plaintiff, tender of the act and its refusal by the defendant is equivalent to the performance of the act. It is a familiar rule that an offer to sell personal property followed by a tender of the purchase price, or an offer to purchase followed by a tender of the chattel is all that is necessary to create a contract for breach of which legal damages may be recovered, and indeed,

[22] L'Amoreux *v.* Gould (1852) 7 N. Y. 349; Willets *v.* The Sun Mut. Ins. Co. (1871) 45 N. Y. 45; Pierson *v* Morsch (1880) 82 N. Y. 503; Marie *v.* Garrison (1880) 83 N. Y. 14; Todd *v.* Weber (1884) 95 N. Y. 181; Roberts *v.* Cobb (1886) 103 N. Y. 600, 9 N. E. 500; National Citizens' Bank *v.* Toplitz (1904) 178 N. Y. 464, 71 N. E. 1; Robb *v.* Wash. & Jeff. College (1905) 103 App. Div. 327, 93 N. Y. Supp. 92.

in New York the tender is sufficient to pass the title and enable the vendor to sue for the purchase price or for the vendee to maintain replevin or trover for his goods.[23] Because of the necessity for a formal conveyance to pass title to real estate, tender of the purchase price, as in *Levin* v. *Dietz,* could not result in the title's passing, as in the case of chattels, but on principle and authority, it is sufficient to complete a contract so far as to entitle the plaintiff to recover damages for its non-performance. It has long been established that an option to purchase real estate upon the payment of a specified sum is enforceable by the option-vendee if he tenders the amount within the time fixed by the option,[24] and until the decision in *Levin* v. *Dietz* this was apparently the rule in New York;[25] but in such a case the option-vendee is neither bound to exercise the option nor bound to pay the purchase price if its tender is rejected.

If, then, it be assumed that a legally binding unilateral contract for the sale of land may be entered into by the tender of the purchase price in accordance with the terms of the offer, is there such want of mutuality of equitable remedy in such a case as to lead a court to deny to the vendee specific performance of the contract? In answering this question, it should be borne in mind that the plaintiff is legally entitled to the benefit of his contract, for if this assumption be not made then there is no contract, and the doctrine of mutuality of equitable relief is inapplicable. Legal damages are inadequate, since the subject matter of the contract is real estate and the defendant's promise to convey is one, the specific performance of which equity is able to compel.

It would be difficult to discover any sound reason, either in law or morals, for denying to the plaintiff the remedy of specific performance in such a case if the court is able to give to the defendant the purchase money in return for the defendant's performance. It is not sufficient to say that the plaintiff is not bound by the contract. This certainly would be no answer if the plaintiff had paid and the defendant had received the purchase money, nor should it be an answer where the defendant refuses it. The

[23]Hayden *v.* Demets (1873) 53 N. Y. 426; see Murphy *v.* Hofman Co. (1915) 215 N. Y. 185, 109 N. E. 101; see also Brinley *v.* Nevins (1914) 162 App. Div. 744, 147 N. Y. Supp. 985; Fiske *v.* Batterson (1914) 165 App. Div. 952, 150 N. Y. Supp. 242; Gordon Malt'g. Co. *v.* Bartels Brew'g. Co. (1912) 206 N. Y. 528, 100 N. E. 457; Justice *v.* Wheeler (1870) 42 N. Y. 493.

[24]See 1 Ames Cases on Equity 431 n. 2, 432 n. 4.

[25]Matter of Hunter (1831) 1 Edw. Ch. 1; and see Rockland-Rockport Lime Co. *v.* Leary (1911) 203 N. Y. 469, 97 N. E. 43.

plaintiff, by submitting himself to the jurisdiction of the court, or by keeping his tender good, gives the court authority to direct the plaintiff to pay the purchase price in exchange for the conveyance by the defendant. This is precisely what the court does in those cases where the defendant but not the plaintiff has complied with the Statute of Frauds, or where an infant party to a contract has filed his bill for specific performance after becoming twenty-one years of age, or where the plaintiff is the assignee of the right of a vendee to recover a judgment for specific performance where the assignee either joins his assignor as a party-defendant, or offers in his bill to pay the amount of the purchase money.[26] In every case where a court enforces an option for a unilateral contract to sell land the plaintiff entitles himself to the relief by tendering the amount stipulated for by the option and offering in his bill to pay the amount upon receiving a conveyance.[27] In each of these cases, although the plaintiff was under no obligation to perform the contract, want of mutuality was removed by filing his bill. The court was then in a position to compel the defendant to perform his contract without imposing any injustice on him, as is the case where there is a true want of mutuality of remedy. An exactly similar jurisdiction is exercised by equity when a mortgagor who has not given a bond or promised to pay a debt for which the mortgage is security, is permitted to redeem from the mortgagee. Although not obligated to pay the mortgage, equity, nevertheless, permits him to redeem from the mortgagee if he submits to the jurisdiction of the court and under its direction pays the amount due. The jurisdiction, it is true, is referable to the jurisdiction which equity exercises over the mortgage relation, but in the case of a unilateral contract for the sale of land, the jurisdiction arises from the inadequacy of legal damages. Want of mutuality of remedy does not deprive a court of its jurisdiction, but is addressed only to the discretion of the court.[28] In *Levin* v. *Dietz*, therefore, the court might have

[26]See Freeson *v.* Bissell (1875) 63 N. Y. 168; Thomson *v.* Smith (1875) 63 N. Y. 301, 304; Wass *v.* Mugridge (1880) 128 Mass. 394.

[27]See note 24 ante.

[28]See Standard Fashion Co. *v.* Siegel-Cooper (1898) 157 N. Y. 60, 51 N. E. 408; Butler *v.* Wright (1906) 186 N. Y. 259, 78 N. E. 1002. This is the proper explanation of the rule that equity will in a proper case allow a plaintiff in default as to the subject matter of the contract to obtain specific performance of the contract with compensation to the defendant Smyth *v.* Sturges (1888) 108 N. Y. 495, 15 N. E. 544, and note 12 ante; and of the jurisdiction which equity exercises in enforcing a negative term of a contract when it cannot or will not enforce the affirmative. See note 40, post.

given a conditional decree, directing the defendant to perform within a specified time if the plaintiff should pay the stipulated price, or it might have directed the plaintiff to pay the purchase price concurrently with the defendant's performance.

The result would have been the exact performance of the contract in accordance with its terms, in accordance with the legal and moral obligation of the defendant, and without injustice to him. To deny relief in such a case upon the basis of a supposed technical rule, unsupported by positive reason or policy, invoked by a defendant to shield himself from the consequences of the wilful breach of his contract, is an inversion of the function of a court of equity.

There is singularly little authority on the precise point involved in *Levin* v. *Dietz.* The Massachusetts court, however, has held in a case identical in its facts with those of *Levin* v. *Dietz,* that the plaintiff was entitled to specific performance;[29] and in *Baumann* v. *Pinckney,*[30] a case which does not seem to have been brought to the attention of the court in *Levin* v. *Dietz,* a different view on this question was taken. In this case a contract had been entered into for the sale of land, which by its terms would expire by default of the vendee before a certain date. The vendor gave to the vendee an oral option to extend the time of the performance and to purchase at an increased price if the vendee at the time and place specified in the contract for closing the title would make a further payment of $10,000 on account of the purchase price. The vendee attended, at the time and place named, ready to tender the $10,000, but no actual tender was made. The court held that under the circumstances of the case an actual tender of the $10,000 was waived by the vendor, that the plaintiff-vendee was therefore in the same position as if a proper tender had been made, and consequently was entitled to a specific performance of his contract. In disposing of the case the court proceeded on the theory that the option to "extend" the contract to purchase at a new price was in effect an offer which the plaintiff-vendee had accepted and that the vendor was bound to perform, although the vendee was not bound to tender the additional $10,000, nor, indeed, was he bound to purchase after he had tendered the additional $10,000.

[29]Boston & Me. R. R. *v.* Bartlett (1849) 57 Mass. 224.

[30](1890) 118 N. Y. 604, 23 N. E. 916.

The case is not distinguishable in principle from *Levin* v. *Dietz*. The offer to "extend" the time of performance and to sell at a higher price could be accepted only by tender of the amount specified. Assuming, as the court did, that the plaintiff was in the same position as if he had tendered payment, the resulting obligation was unilateral as was that in *Levin* v. *Dietz*. The court, however, found no difficulty in awarding specific performance, and taking the view of the court that there was a contract without a tender on the plaintiff's part, it cannot be said that any injustice was done by giving the plaintiff the benefit of his contract.

A logical application of the decision in *Levin* v. *Dietz* would result in holding that an option for the purchase of land given for good consideration which contemplates the exercise of the option by the tender of a payment of money by the vendee to the vendor is not enforceable in equity, since the option vendee is under no obligation to exercise his option or to pay the purchase money if his tender of it is refused by the vendor. The same reasoning which denied mutuality of remedy in *Levin* v. *Dietz* would deny it in an option contract, although it is possible for the court to make a decree which would leave the contract fully performed and do complete justice between the parties. That such contracts are enforceable in equity is established by authority outside of New York,[31] and it is not probable that the New York courts will apply the doctrine of *Levin* v. *Dietz* to option contracts.

In the *Matter of Hunter*,[32] cited in *Levin* v. *Dietz*, such an option was enforced, the court expressly pointing out that there might be mutuality of remedy without mutuality of obligation, saying:[33]

"The court may, therefore, in a proper case, when there is a covenant on one side and no mutuality, decree a performance."

Indeed, in *Bullock* v. *Cutting*,[34] the court granted specific performance of an option in a lease to sell the leased premises to the lessee for a sum named in the lease. In this case it was held that no tender of the amount specified was necessary where the

[31] 1 Ames Cases on Equity 431 n. 2, 432 n. 4.
[32] (N. Y. 1831) 1 Edw. Ch. 1.
[33] At p. 5.
[34] (1913) 155 App. Div. 825, 140 N. Y. Supp. 686.

lessor had repudiated the option. The court nevertheless held that the plaintiff was entitled to have the option performed, saying, at page 830:

"The court of appeals could not have intended to hold in *Levin* v. *Dietz* that such contracts (options) were unilateral, and incapable of enforcement."

And again, in *Carney* v. *Pendelton*,[35] the court, although it considered the option when exercised as creating a bilateral contract, nevertheless felt called upon to say:[36]

"The learned counsel for the respondents claim, and the learned trial court seems to have held, that by two recent decisions of the Court of Appeals, this well established rule has been overthrown. (*Wadick* v. *Mace*, 191 N. Y. 1; *Levin* v. *Dietz*, 194 id. 376.)

"We do not so understand them. In *Wadick* v. *Mace* (*supra*) the decision was put on the ground that it affirmatively appeared from the written instrument that the remedy of specific performance was expressly waived, and in *Levin* v. *Dietz* (*supra*) the decision was put on the ground that there had been no acceptance of the vendor's promise to perform until after the promise had been withdrawn."

A recent decision of the Court of Appeals has shown a disposition of that court not to adhere strictly to the rule that the obligation of the contract must be mutual in order to entitle either party to specific performance. In *Catholic etc. Society* v. *Oussani*[37] an officer of the plaintiff-corporation, so far as appeared, without authority, had entered into a contract for the purchase of land. The contract contained a provision that unless a road running through the property proposed to be sold should be closed within one week, the plaintiff "should be in no way obliged." The court held that upon proper proof of the ratification of the contract the plaintiff would be entitled to specific performance of his contract, saying:[38]

"There may be an exception here to the general rule that mutuality must be judged as of the date of the contract, but if so, it is as well established as the rule itself."

While this case was not necessarily inconsistent with *Levin* v. *Dietz*, if the provision for the closing of the road be treated as

[35](1910) 139 App. Div. 152, 123 N. Y. Supp. 738.

[36]At p. 153.

[37](1915) 215 N. Y. 1, 109 N. E. 80.

[38]At p. 8.

a condition of the contract only, it does seem inconsistent with the decision in *Wadick* v. *Mace,* where the stipulation reserved in favor of the vendee that he should not be compelled to perform specifically his contract was held to deprive the vendor of the right of specific performance because there was want of mutuality.

The notion that the mutuality rule is in some way necessarily dependent upon an obligation on the part of the plaintiff is to be noted in New York in a certain class of cases dealing with contracts involving personal employment or service, where the plaintiff being under no obligation to employ or serve the defendant is, nevertheless, entitled by the terms of his contract to call upon the defendant to refrain from rendering services to others in like capacity.

The doctrine of the English courts established in *Lumley* v. *Wagner,*[39] that one who employs another whose services are unique, and stipulates that the person employed shall not serve others during the term of the contract, may enforce the negative term of the contract by injunction, is accepted in New York,[40] although in granting an injunction in such cases the courts clearly have created an exception to the general rule that the remedies on the contract must be mutual. Since the court cannot compel the defendant to perform the affirmative part of the contract, it will not compel the plaintiff to perform his part of the contract, and it must necessarily leave a substantial part of the contract unperformed by its decree. Where, however, the plaintiff has fully performed the contract on his part, he is entitled, irrespective of any want of mutuality, to have so much of the defendant's contract performed as the court is able to direct, even though it be less than full performance. Thus, it is not open to question that if *A* paid a sum of money to *B,* a celebrated artist, to perform in *A's* theatre and not to perform in a rival theatre for a specified time, *A* assuming no other obligation, there would be no violation of the mutuality rule, and no failure of justice if the court restrained *B* from singing for the rival theatre, although it could not compel *B* to sing for *A*. *A* having fully performed, is entitled to have such performance as the court can give, although it may be less than complete performance of *B's* contract.

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[39](1852) 1 DeG. M. & G. *604.

[40]Duff *v.* Russell (1891) 60 N. Y. Super. Ct. 80, 14 N. Y. Supp. 134, aff'd. 133 N. Y. 678, 31 N. E. 622; Hayes *v.* Willio (1871) 11 Abb. Pr. (N. s.) 167; see Arena Ath. Club *v.* McPartland (1899) 41 App. Div. 352, 58 N. Y. Supp. 477; Canary *v.* Russell (1894) 9 Misc. 558, 30 N. Y. Supp. 122; Roosen *v.* Carlson (1899) 46 App. Div. 233, 235, 62 N. Y Supp. 157.

In *Star Co.* v. *Press Publishing Co.*,[41] the plaintiff employed one of the defendants at a fixed annual salary for five years, to draw illustrations to be published in plaintiff's newspaper, he contracting not to draw illustrations for any rival newspaper during the five years. But the contract contained a stipulation that neither party to it should be bound to perform the affirmative only at his option after the first three years of the contract. At the expiration of three years plaintiff, as was its right under the contract, declined to employ the defendant longer and brought its action to restrain the defendant from drawing illustrations for a rival newspaper.

It will be observed that both parties had fully performed the affirmative part of the contract, and that the only part of the contract remaining unperformed was the defendant's negative stipulation which, by the terms of the contract, was to survive the affirmative stipulations contained in it. The defendant therefore had received all that it was entitled to receive under the contract, but the plaintiff was still entitled to have the defendant perform the negative part of the contract. Nevertheless, the court refused an injunction on the ground that there was want of mutuality in the contract, the court saying, p. 489:

"In order to uphold an injunction in a case like the present there must be mutuality of obligation and there must also be an obligation on the part of the enjoined servant to render to the plaintiff the services which it is sought to prevent his rendering to another. In other words, the negative covenant not to render services to another will not be enforced in equity unless it is supported by a positive covenant to render services to the party seeking the injunction."[42]

And again the court said, at page 491, in analyzing the agreement:

"So when the agreement is reduced to its ultimate elements it will be found that at least for the two years from October,

[41] (1914) 162 App. Div. 486, 147 N. Y. Supp. 579.

[42] The court in Star Co. *v.* Press Pub. Co., *supra*, cited two cases as authority for this proposition. In one, Rice *v.* D'Arville (1894) 162 Mass. 559, 39 N. E. 180, the plaintiff was bound by his contract, but became financially unable to pay the defendant, whereupon, the defendant sought other employment in violation of the negative term of her contract. The court held that it would not aid the plaintiff by an injunction in view of his inability to perform on his part. In the other, Metropolitan Exhib. Co. *v.* Ward (1890) 24 Abb. N. C. 393, 9 N. Y. Supp. 779, the plaintiff which had employed the defendant as a baseball player "reserved" his services for the following summer on a salary of $3,000 per year and provided that the plaintiff might terminate the contract at any time on ten days' notice. It was held that a preliminary injunction would not be granted because the contract was not sufficiently definite or mutual.

1913, to October, 1915, it imposes no fixed and definite obligation upon Dirks to furnish drawings to plaintiff, or upon plaintiff to accept such drawings as Dirks might offer, and no obligation upon the plaintiff's part to pay Dirks anything unless he shall furnish drawings which are accepted. There is, therefore, nothing left except Dirks' negative covenant not to supply drawings to anyone except plaintiff, unsupported by any positive covenant * * * by plaintiff to accept and pay for such drawings as may be offered. The negative covenant under such circumstances is without consideration to support it and is enforceable by injunction."

That a court of equity may, in its discretion, refuse specific performance of a contract which unreasonably restricts a defendant from engaging in making a livelihood or which is harsh or grossly unfair in its terms, is well settled.[43] But these decisions are referable to the doctrine of hardship, which bears no relation to the mutuality rule. If, therefore, it be assumed that the contract in *Star Co.* v. *Press Pub. Co.* was fair and reasonable in its terms so as to preclude the exercise of the court's discretion in favor of the defendant to avoid hardship, then the mutuality rule should be no bar to the plaintiff's relief, since the defendant had received the full benefit of the plaintiff's performance. And there was no practical difficulty in the court's directing the performance of the negative term of the contract, which was the only part remaining unperformed by the defendant. A similar question was involved in *Winslow* v. *Mayo*,[44] in which the defendant contracted to employ the plaintiff to sell certain specified merchandise on commission, with a stipulation that if the defendant should receive an offer for all or part of the goods he should offer them to the plaintiff at the same price before accepting the offer from a third person. Although this stipulation was affirmative in form, it was in effect negative in substance, namely, a stipulation not to sell the merchandise to anyone without having offered it to the plaintiff.[45] The court refused its relief in part at least, because the plaintiff was not bound to render service to the defendant, and there was therefore a want of mutuality.

[43]Ehrman *v.* Bartholomew [1898] 1 Ch. 671; Dockstader *v.* Reed (1907) 121 App. Div. 846, 106 N. Y. Supp. 795; Witmark & Sons *v.* Peters (1914) 164 App. Div. 366, 149 N. Y. Supp. 642; but *cf.* McCall Co. *v.* Wright (1910) 198 N. Y. 143, 91 N. E. 516.

[44](1908) 123 App. Div. 758, 108 N. Y. Supp. 640.

[45]The court will always look through the form and ascertain whether in point of substance the contract involves a negative stipulation to refrain from doing something which it can enforce, Metropolitan etc. Supply Co. *v.* Grinder [1901] 2 Ch. 799, or whether it is affirmative, involving certain acts or personal services, which it will not enforce. Davis *v.* Foreman [1894] 3 Ch. 634.

As was said by Judge Lowell in *Singer, etc. Co.* v. *Union, etc. Co.*:[46]

"It is no doubt true in general that where only one side is bound to an agreement which remains wholly executory, a court of equity will not usually interfere to enforce the agreement against the party who is bound. The simplest case of this kind is where an infant is one party to a contract for the sale of land. The reason given is that the party who was not bound would enforce the contract if for his advantage, and repudiate it if the contrary. (*Lawrenson* v. *Butler*, 1 Sch. and Lef. 13.)

"The doctrine is often invoked in that class of cases, but there are innumerable cases where the party seeking the performance is no longer bound to anything, having paid the consideration in the outset, or performed his part; or where the plaintiff does not rest on a contract wholly executory, to which this doctrine does not apply. I have some doubt of its application in this case. Supposing the stipulation to mean what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable consideration, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction as usual, so long as it has not forfeited."

If, therefore, the plaintiff in *Winslow* v. *Mayo* had, by serving the defendant, entitled himself to performance of the defendant's promise to offer the merchandise to the plaintiff, and he had not forfeited that right by his refusal to perform for the defendant, the mere fact that the plaintiff was not bound to serve the defendant should not prevent the court's taking jurisdiction.

The same view was taken in *Redican* v. *Interchangeable, etc. Sign Co.*,[47] where the plaintiff asked specific performance of a contract, giving to him the exclusive sales agency of the defendant for five years, provided the plaintiff would, during four months, employ five salesmen to sell the products of the defendant outside of New York City. The complaint alleged and the answer admitted performance by the plaintiff for two months, whereupon defendant cancelled the contract. The court refused an injunction, in part on the ground that there was want of mutuality, because the plaintiff was not bound to act as agent. The court here might conceivably have refused relief on the ground that no contract had come into existence, and since the defendant's offer called for four months' service on the part

[46](C. C. 1st, 1873) Holmes 253.

[47](1914) 162 App. Div. 803, 146 N. Y. Supp. 596.

of the plaintiff, and the defendant had prevented the plaintiff from performing before the expiration of the four months, that then no contract had actually come into existence. But if it be assumed, as apparently many of the New York decisions do assume, that the defendant may not withdraw his offer when the plaintiff has once begun the performance of an act given in exchange therefor, which, if completed, would create a unilateral contract, then, obviously, there is no want of mutuality of remedy under the doctrine so ably stated by Judge Lowell, that the plaintiff should be entitled to an injunction protecting his license or exclusive right so long as it is not forfeited by his own act.

A different view, and one more consistent with principle, was expressed by the court in *Mutual Milk Co.* v. *Prigge*,[48] and in *Mutual Milk Co.* v. *Heldt*.[49] In the first of these cases the defendant, an employee of the plaintiff, agreed not to solicit customers of the plaintiff for three years after leaving the plaintiff's employ. The court issued its injunction, holding that the want of mutuality of obligation in the contract was no bar to a specific performance, although the court could not have compelled the plaintiff to employ the defendant or the defendant to serve the plaintiff. Still, when the affirmative contract of employment had been fully performed by the parties it constituted consideration for the defendant's negative stipulation and there was no want of mutuality of remedy in the contract. And in the second case, where the contract contained the same stipulation and also a stipulation that the plaintiff should not discharge the defendant except on one week's notice, and the plaintiff discharged the defendant without notice, but tendered one week's wages, it was held that the plaintiff was entitled to an injunction. The defendant having received the full benefit of his contract could not complain at being compelled to perform the negative stipulation by which he was bound.

Contrasting the cases hereinbefore referred to, in which specific performance has been granted, with those in which it has been denied on the ground of want of mutuality of equitable remedy, it seems apparent that in applying the rule, the courts of this State have misinterpreted it or at least lost sight of the reason upon which founded. As was said by Mr. Justice Romer,[50]

[48](1906) 112 App. Div. 652, 98 N. Y. Supp. 458.

[49](1907) 120 App. Div. 795, 105 N. Y. Supp. 661.

[50]Biggs *v.* Hoddinott [1898] 2 Ch. 307, 313.

"There is a great principle which I think ought to be adhered to by this court and by every court where it can possibly do so; that is to say that a man shall abide by his contracts and that a man's contracts should be enforced as against him."

This should be the cardinal principle of equity in exercising its jurisdiction over contracts wherever legal damages afford an inadequate remedy. The doctrine that the remedies must be mutual is one invented by the courts of equity to prevent the injustice which in many cases would result if the court should give specific performance against a defendant without at the same time insuring to the defendant the performance of the plaintiff's contract. To allow the defence upon any other ground, if the contract be fair and reasonable in its provisions, is to do an injustice to the plaintiff and to violate the principle of first importance that a man's contract should be enforced against him.

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